

1-2010

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### Recommended Citation

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# *In Memoriam*

## Judge Melvin T. Brunetti: Bringing Life to a Democratic Rule of Law

CHRISTOPHER D. SULLIVAN,\* EUGENE S. LITVINOFF,\*\*  
AND MARK J. SEIFERT\*\*\*

*Judge Melvin T. Brunetti was a judge on the United States Court of Appeals for the Ninth Circuit and a prominent alumnus of Hastings College of the Law. In this Article, three of Judge Brunetti's former law clerks discuss his exemplary life and career as a jurist.*

*The Article opens with a discussion of Judge Brunetti's life experiences and how those experiences influenced his judicial views. The Article then presents a survey of Judge Brunetti's judicial record. The survey of Judge Brunetti's work on the bench commences with his early years as a judge and discusses a number of his higher profile decisions. The Article next discusses Judge Brunetti's work during the 1990s, including important cases concerning the First Amendment, the Fourth Amendment, and other issues. This section of the Article also discusses the extraordinary and dramatic judicial proceedings that took place immediately prior to the execution of Robert Alton Harris in 1992. Harris was the first prisoner in California to be executed in more than 25 years. The Article also discusses Judge Brunetti's work during the years that he enjoyed senior status. This discussion addresses cases involving several constitutional, criminal and civil issues, such as § 1983 jurisprudence, First Amendment issues, sentencing issues, and intellectual property issues.*

*The Article concludes with commentary on Judge Brunetti's disciplined and principled application of law to facts during the course of his career. Judge Brunetti has bestowed upon us a legacy of cases that reflect the principle that a strong and independent federal judiciary and the rule of law are critical components of our democracy.*

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## TABLE OF CONTENTS

INTRODUCTION.....	1504
I. THE PATH TO THE NINTH CIRCUIT .....	1505
II. JUDGE BRUNETTI'S JUDICIAL RECORD .....	1507
A. THE BEGINNING YEARS: 1985-1990 .....	1507
B. THE MIDDLE YEARS: 1991-1999 .....	1511
1. <i>Overview</i> .....	1511
2. <i>The Execution of Robert Alton Harris</i> .....	1514
C. THE SENIOR STATUS YEARS: 1999-2009.....	1516
CONCLUSION .....	1527

## INTRODUCTION

The life and career of Judge Melvin T. Brunetti<sup>1</sup> stands as a remarkable testament to the promise that people of great character, integrity, and good humor can carry forward the mantle of a democratic rule of law. Judge Brunetti served for twenty-four years on the United States Court of Appeals for the Ninth Circuit, and his many written opinions are a firm part of the fabric of the court's precedents.<sup>2</sup> But for those who have had the good fortune of knowing Judge Brunetti, it is his personal legacy that stands out. Judge Brunetti demonstrated that the process of getting to the result is at least as important as the outcome, and that legal decisions are best made by consistently following the principles that a judge believes in to reach a fair result. Judge Brunetti stands among the most prominent and respected alumni of University of California, Hastings College of the Law.

In this Article, we will explore first how Judge Brunetti's unique background and life experience exemplify the American democratic ideal that hard work, talent, and perseverance can lead to great opportunities. Next we will review a selection of notable opinions written by Judge Brunetti and important cases in which he participated. These case reviews demonstrate how Judge Brunetti followed his belief that "there is no substitute for excellence in the practice of law."<sup>3</sup> Judge Brunetti's judicial record shows a firm commitment to following his

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1. Judge Melvin T. Brunetti passed away after a long battle with cancer on October 30, 2009, at his home in Reno, Nevada. News Release, United States Courts for the Ninth Circuit, Court of Appeals Mourns Loss of Senior Circuit Judge Melvin T. Brunetti (Nov. 2, 2009), *available at* [http://www.ce9.uscourts.gov/cm/articlefiles/124-2009\\_Brunetti\\_Obit.pdf](http://www.ce9.uscourts.gov/cm/articlefiles/124-2009_Brunetti_Obit.pdf). He was still serving as a Senior Judge of the United States Court of Appeals for the Ninth Circuit. *Id.*

2. *See id.*

3. Robert J. Johnston, *In Memoriam: Hon. Melvin T. Brunetti*, NEV. LAW., Jan. 2010, at 50, 50.

principles and objectively applying the law in the best tradition of the federal judiciary.

### I. THE PATH TO THE NINTH CIRCUIT

Judge Brunetti was born on November 10, 1933, in Reno, Nevada.<sup>4</sup> His grandparents had immigrated from Italy.<sup>5</sup> Judge Brunetti's paternal grandfather left Italy in search of opportunity and work in America.<sup>6</sup> His grandfather arrived at Ellis Island and worked his way west to Reno where he started a grocery business.<sup>7</sup> Judge Brunetti grew up in a close-knit family in Reno and Sparks, Nevada.<sup>8</sup> His father operated a grocery store and then established a farm and ranch operation in rural Sparks.<sup>9</sup> When he started kindergarten he did not speak English.<sup>10</sup> Years later, when voting to strike down an English-only law in Arizona, the judge "explained in conference that his grandfather in Nevada would not have been able to obtain any services from the government in any other way. His grandfather spoke only Italian."<sup>11</sup>

At the urging of his mother, Judge Brunetti "started playing the clarinet in the fourth grade" and developed a life-long love of music.<sup>12</sup> By high school he had started a band that became known as "Brunetti's Band."<sup>13</sup> Judge Brunetti later would often entertain his law clerks with stories of his days in Brunetti's Band and even organized a reunion of the band later in his life.<sup>14</sup>

Judge Brunetti graduated from Sparks High School and began his undergraduate education at the University of Nevada, Reno, studying

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4. Federal Judicial Center, Biographical Directory of Federal Judges, Melvin T. Brunetti, <http://www.fjc.gov/servlet/nGetInfo?jid=294&cid=999&ctype=na&inststate=na> (last visited June 24, 2010).

5. Johnston, *supra* note 3.

6. Lana Chiarello & Rebecca Poate, *Judicial Profile: Hon. Melvin T. Brunetti*, FED. LAW., Nov.–Dec. 2005, at 16, 16.

7. *Id.*

8. *See id.*

9. *Id.*

10. Johnston, *supra* note 3.

11. As relayed by Judge Stephen Reinhardt in an obituary, Dan Levine, *Melvin Brunetti, 75, Was Senior Ninth Circuit Judge*, RECORDER, Nov. 3, 2009, at 2; *see also* Dhyana Levy, *Conservative Judge Exercised a Practical Approach*, DAILY J., Nov. 3, 2009, at 8. The case referenced was *Yniguez v. Arizonans for Official English*, which was decided by a six-to-five vote. 69 F.3d 920, 924 (9th Cir. 1995) (en banc). Though the en banc decision was vacated by the United States Supreme Court because Yniguez lacked standing, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), the Arizona Supreme Court also subsequently struck down the law as unconstitutional, writing "we agree with the result and with much of the reasoning of the Ninth Circuit opinion." *Ruiz v. Hull*, 957 P.2d 984, 987 n.1 (Ariz. 1998).

12. Johnston, *supra* note 3; *see also* Chiarello & Poate, *supra* note 6, at 16–17; News Release, United States Court for the Ninth Circuit, *supra* note 1.

13. Chiarello & Poate, *supra* note 6, at 17.

14. *See id.* at 19.

electrical engineering.<sup>15</sup> Encouraged by his life-long good friend, Judge Procter Hug, Jr., Judge Brunetti was elected the junior class president.<sup>16</sup> In 1953, Judge Brunetti left the University of Nevada early to enter the dairy business.<sup>17</sup> Judge Brunetti became the operation manager for a new dairy that produced, processed, and distributed milk products to all of Nevada and part of California.<sup>18</sup> Judge Brunetti's experience in business gave him a unique practical insight to approaching legal issues.<sup>19</sup> During the years 1954–56, Judge Brunetti also served in the Army National Guard.<sup>20</sup> After seven years in the dairy business, Judge Brunetti returned to the University of Nevada, Reno to pursue a major in accounting.<sup>21</sup>

Judge Brunetti then decided to pursue a career in law and enrolled at the University of California, Hastings College of the Law.<sup>22</sup> Judge Brunetti was proud of the fact that he was a member of the last class of the four-year program at Hastings.<sup>23</sup> "He worked his way through law school in the tax department of Arthur Young & Company"<sup>24</sup> until he graduated in 1964.<sup>25</sup> Judge Brunetti then began practicing law as a litigator, working as an associate at Vargas, Bartlett and Dixon until 1969.<sup>26</sup>

During this time, Judge Brunetti married his wife, Gail, with whom he would enjoy forty-four years of marriage.<sup>27</sup> Judge Brunetti was a devoted family man and would raise three children and many well-loved dogs.<sup>28</sup> After working at Vargas, Judge Brunetti joined the firm of Laxalt, Bell, Berry, Allison and LeBaron, becoming a partner in 1971.<sup>29</sup> He was also a shareholder in the firm of Allison, Brunetti, MacKenzie, Hartman, Soumbeniotis and Russell from 1978 until his appointment to the federal bench.<sup>30</sup>

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15. *Id.* at 17; News Release, United States Court for the Ninth Circuit, *supra* note 1.

16. *See* Chiarello & Poate, *supra* note 6, at 17; Johnston, *supra* note 3.

17. *See supra* note 16.

18. Chiarello & Poate, *supra* note 6, at 17.

19. For example, as reported by the *Los Angeles Times*, "Circuit Judge Diarmuid F. O'Scannlain, a fellow Reagan appointee, credited Brunetti's business and accounting experience for his 'knack in questioning counsel in a way that brought out fascinating aspects of a case.'" Carol J. Williams. *Melvin Brunetti, 1933-2009, Federal Appellate Judge for 24 Years*, L.A. TIMES, Nov. 3, 2009, at A19.

20. *See* Federal Judicial Center, Biographical Directory of Federal Judges, *supra* note 4.

21. Johnston, *supra* note 3.

22. *Id.*

23. *See* Chiarello & Poate, *supra* note 6, at 17.

24. *Id.*

25. News Release, United States Court for the Ninth Circuit, *supra* note 1.

26. *Id.*

27. *Id.*

28. *See* Chiarello & Poate, *supra* note 6, at 17, 19.

29. *See* News Release, United States Court for the Ninth Circuit, *supra* note 1.

30. *Id.*

Judge Brunetti was active with the Nevada State Bar and served as president from 1984 to 1985.<sup>31</sup> Judge Brunetti became involved in politics and was a member of the Council of Legal Advisors to the Republican National Committee from 1982 to 1985.<sup>32</sup> Judge Brunetti was first nominated to the Ninth Circuit by President Ronald Reagan on October 5, 1984,<sup>33</sup> but his nomination was not considered before Congress adjourned *sine die* on October 12 in anticipation of the upcoming presidential election.<sup>34</sup> Judge Brunetti would recall this circumstance with humor later, and it typifies how Judge Brunetti often had to work twice as hard for everything he achieved. President Reagan nominated Judge Brunetti again on February 26, 1985, and he was confirmed by the Senate on April 3, 1985.<sup>35</sup>

## II. JUDGE BRUNETTI'S JUDICIAL RECORD

### A. THE BEGINNING YEARS: 1985–1990

It would not take long for Judge Brunetti to jump into the center of many of the most difficult cases decided by the Ninth Circuit. In *Adamson v. Ricketts*, an en banc decision first argued within six months of his appointment, Judge Brunetti would write a forceful dissent from the majority's decision reversing a murder conviction on double jeopardy grounds.<sup>36</sup> The majority found that the defendant's retrial for first degree murder, after he had breached a plea agreement that resulted in his conviction for second degree murder, violated his double jeopardy rights.<sup>37</sup> In his dissent, Judge Brunetti contended that it was the respondent's refusal to testify that triggered the second prosecution and that "the [D]ouble [J]eopardy [C]lause 'does not relieve a defendant from the consequences of his voluntary choice.'"<sup>38</sup> Judge Brunetti's position was vindicated by the United States Supreme Court. It reversed the Ninth Circuit, holding that, although "[t]he parties could have struck a different bargain, . . . permitting the State to enforce the agreement the parties actually made does not violate the Double Jeopardy Clause."<sup>39</sup>

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31. *Id.*

32. Media Release, United States Courts for the Ninth Circuit, Ninth Circuit Judge Melvin Brunetti of Reno, Nevada To Assume Senior Status (Oct. 27, 1999), available at <http://207.41.19.15/web/OCELibra.nsf/504ca249c786e20f85256284006da7ab/a8f4f3652751a42b8825681700739dfe?OpenDocument>.

33. *Reagan Nominates 5 To Fill Judgeships in Federal Courts*, N.Y. TIMES, Oct. 7, 1984, at 58.

34. See DENIS STEVEN RUTKUS & KEVIN M. SCOTT, CONG. RESEARCH SERV., NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS, CRS-19 (Aug. 13, 2008), available at <http://fas.org/sfp/crs/misc/RL34615.pdf>.

35. News Release, United States Courts for the Ninth Circuit, *supra* note 1.

36. 789 F.2d 722, 735 (9th Cir. 1986) (en banc), *rev'd*, 483 U.S. 1 (1987).

37. *Id.* at 725–27.

38. *Id.* at 740 (Brunetti, J., dissenting) (quoting *United States v. Scott*, 437 U.S. 82, 99 (1978)).

39. *Ricketts v. Adamson*, 483 U.S. 1, 12 (1987).

In his early tenure on the bench, Judge Brunetti also faced a particularly difficult decision regarding the scope of the jurisdiction of a Native American tribal court: "whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member."<sup>40</sup> The case was argued on October 8, 1985, first decided by the Ninth Circuit panel on July 9, 1987,<sup>41</sup> and ultimately overturned by the Supreme Court on August 15, 1990.<sup>42</sup> The decision was one of first impression.<sup>43</sup> Judge Brunetti framed the issue as "concern[ing] one of the uncharted reaches of tribal jurisdiction and present[ing] a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question."<sup>44</sup> Judge Brunetti came down in favor of honoring tribal rights:

The cases discussing the federal criminal statutory scheme clearly indicate that if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so. Absent such divestment it is reasonable to conclude that tribal courts retain jurisdiction over crimes committed by Indians against other Indians without regard to tribal membership.<sup>45</sup>

The Supreme Court reversed, holding, "[i]n the area of criminal enforcement, . . . tribal power does not extend beyond internal relations among members."<sup>46</sup> Notably, Justice Brennan, joined by Justice Marshall, dissented, because he did "not share such a parsimonious view of the sovereignty retained by Indian tribes."<sup>47</sup> This time Judge Brunetti was vindicated by the United States Congress:

On November 5, 1990, amendments to the Indian Civil Rights Act (ICRA) became effective which overruled the Supreme Court decision in *Duro*. . . . A House Conference Report explains that the amendments "recognize and affirm the inherent power of tribes to exercise criminal misdemeanor jurisdiction over all Indians on their respective reservations" and that the amendments were consistent with "two hundred years of Federal law."<sup>48</sup>

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40. *Duro v. Reina*, 851 F.2d 1136, 1138 (9th Cir. 1987), *rev'd*, 495 U.S. 676, 684 (1990).

41. *Id.* at 1136.

42. *Duro*, 495 U.S. at 676.

43. *Duro*, 851 F.2d at 1139.

44. *Id.*

45. *Id.* at 1143.

46. *Duro*, 495 U.S. at 688.

47. *Id.* at 698 (Brennan, J., dissenting).

48. *Mousseaux v. U.S. Comm'r of Indian Affairs*, 806 F. Supp. 1433, 1441 (D.S.D. 1992) (quoting H.R. REP. NO. 101-938, at 132-33 (1990)) (internal citations omitted). The emergency legislation was initially temporary, but was "replaced with identical permanent legislation on October 28, 1991." *Id.* at 1440.

Judge Brunetti also found himself at the forefront of brewing battles over the sentencing of criminal defendants. In a case decided at the very end of his first year, *United States v. Hall*, Judge Brunetti authored an opinion upholding a sentencing decision.<sup>49</sup> He noted that “[i]t has long been the rule that the matter of sentencing is within the discretion of the sentencing judge and generally is not reversible as long as the sentence falls within the bounds set by statute.”<sup>50</sup> But the traditional discretion given to sentencing judges in federal courts was about to dramatically change. On November 1, 1987, the United States Sentencing Guidelines became effective.<sup>51</sup> The Sentencing Guidelines were the product of the United States Sentencing Commission, appointed by President Reagan after he signed into law the Sentencing Reform Act of 1984.<sup>52</sup> Judge Brunetti was on the panel of Ninth Circuit judges that considered one of the first constitutional challenges to them. In a two-to-one decision, Judge Brunetti joined in Judge Kozinski’s opinion striking down the Sentencing Guidelines as an unconstitutional intrusion on the role of the federal judiciary in violation of the separation of powers doctrine.<sup>53</sup> It is not surprising that Judge Brunetti would agree with Judge Kozinski’s observation, “Because judges must act—and be perceived to act—with complete impartiality in carrying out their responsibilities, the Constitution creates a wall of separation between the judiciary and the other branches; that wall is only seldom breached.”<sup>54</sup> The Ninth Circuit’s ruling was struck down quickly by the Supreme Court’s decision in *Mistretta v. United States*.<sup>55</sup>

The end of Judge Brunetti’s first five years on the bench would be marked by the start of a series of appeals arising from the murder conviction of Robert Alton Harris. In *Harris v. Pulley*,<sup>56</sup> the Ninth Circuit considered a number of constitutional issues that were left unresolved by two federal habeas corpus petitions.<sup>57</sup> The panel unanimously rejected seven contentions that Harris’s constitutional rights had been violated in

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49. 778 F.2d 1427, 1428 (9th Cir. 1985).

50. *Id.*

51. See *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1248 (9th Cir. 1988), *vacated sub nom. United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989).

52. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 and 28 U.S.C. §§ 991–998 (2006)); *Gubiensio-Ortiz*, 857 F.2d at 1246–48.

53. *Gubiensio-Ortiz*, 857 F.2d at 1266.

54. *Id.* at 1261.

55. 488 U.S. 361 (1989).

56. 885 F.2d 1354 (9th Cir. 1989).

57. The Ninth Circuit originally vacated the district court’s decision to deny habeas corpus relief, *Harris v. Pulley*, 692 F.2d 1198, 1192 (9th Cir. 1982), but was subsequently reversed by the Supreme Court. See *Pulley v. Harris*, 465 U.S. 37, 51 (1984) (concluding that California’s capital sentencing system is constitutional without a comparative proportionality review). The case returned to the Ninth Circuit after the district court again denied habeas corpus relief. *Harris*, 885 F.2d at 1359.



connection with his conviction and sentencing.<sup>58</sup> A majority of the Ninth Circuit rejected a call to hear the case en banc<sup>59</sup> and the Supreme Court denied review.<sup>60</sup>

Harris filed a third habeas petition in March, 1990, which the district court denied.<sup>61</sup> Oral argument on the appeal was held before the same Ninth Circuit panel on May 14, 1990, and the district court was initially affirmed in an opinion filed on August 29, 1990.<sup>62</sup> The opinion, though, was subsequently amended several times to account for new developments in the case.<sup>63</sup> The amended opinion denied Harris the relief sought in his habeas petition.<sup>64</sup> The majority's most important holdings were that Harris had raised issues late, constituting an abuse of the writ under *McLesky v. Zant*;<sup>65</sup> that Harris was not denied effective access to psychiatric expertise under *Ake v. Oklahoma*;<sup>66</sup> and that Harris was trying to apply a new rule of law that could not be retroactively applied under *Teague v. Lane*.<sup>67</sup> By the time the amended opinion was issued, there was substantial disagreement within the Ninth Circuit on the issues raised. Though the Ninth Circuit did not grant en banc review of the panel's decision, Judge Reinhardt both dissented from the decision not to grant review and broadly hinted that the vote on en banc review was a tie.<sup>68</sup> The Supreme Court again denied review.<sup>69</sup> Robert Alton Harris was on track to be the first person in more than twenty-five years to be executed in California.<sup>70</sup>

Judge Brunetti was also at the center of a controversial decision in *High Tech Gays v. Defense Industrial Security Clearance Office*.<sup>71</sup> Writing for a unanimous court, Judge Brunetti concluded that the Department of Defense's policy of refusing to grant security clearances to known or suspected gay applicants should survive a constitutional attack.<sup>72</sup> In large part, the panel relied on the then-recent Supreme Court opinion in

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58. *Harris*, 885 F.2d at 1359.

59. *Id.* at 1383.

60. *Harris v. Pulley*, 493 U.S. 1051 (1991).

61. *Harris v. Vasquez*, 913 F.2d 606, 608-09 (9th Cir. 1990).

62. *Id.* at 606.

63. *Harris v. Vasquez*, 949 F.2d 1497, 1497 (9th Cir. 1991).

64. *Id.* at 1529.

65. *Id.* at 1511-16 (citing *McLesky v. Zant*, 499 U.S. 467 (1991)).

66. *Id.* at 1516-18 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)).

67. *Id.* at 1522 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

68. *See id.* at 1540 (Reinhardt, J., dissenting). It was reported in both the *New York Times* and the *Los Angeles Times* that the vote was a thirteen-to-thirteen tie. *See* Charles M. Sevilla & Michael Laurence, *The Robert Alton Harris Execution: Thoughts on the Cause of the Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345, 366 n.67 (1992).

69. *Harris v. Vasquez*, 503 U.S. 910 (1992).

70. Sevilla & Laurence, *supra* note 68, at 348.

71. 895 F.2d 563 (9th Cir. 1990).

72. *Id.* at 579.

*Bowers v. Hardwick*,<sup>73</sup> which held “that homosexual activity is not a fundamental right protected by substantive due process and that the proper standard of review under the Fifth Amendment is rational basis review.”<sup>74</sup> The opinion acknowledged that homosexuals suffered a history of discrimination,<sup>75</sup> but the panel also noted “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do ‘attract the attention of the lawmakers,’ as evidenced by such legislation.”<sup>76</sup> This decision reflected Judge Brunetti’s reluctance to use courts as a substitute for prompting change through political or legislative efforts.

## B. THE MIDDLE YEARS: 1991–1999

### I. Overview

In 1991, Judge Brunetti authored *Gaudiya Vaishnava Society v. City & County of San Francisco*.<sup>77</sup> This was an important First Amendment case upholding the free speech rights of nonprofit organizations seeking to raise money in connection with other activities. The appeal arose from a challenge to “the constitutionality of an ordinance which regulates the sale of merchandise on public sidewalks by nonprofit groups.”<sup>78</sup> The Court affirmed the finding that “the city ordinance was unconstitutional on its face because it permitted the denial or revocation of a permit [for the sale of merchandise] on the basis of discretionary judgment by the Chief of Police.”<sup>79</sup> Significantly, the opinion held that “when nonprofits engage in activities where pure speech and commercial speech are inextricably intertwined the entirety must be classified as fully protected noncommercial speech.”<sup>80</sup>

Judge Brunetti’s opinion in *Gaudiya Vaishnava Society* is one of several he wrote around this time that illustrate his strengths in analyzing the development of common law, including federal common law, his respect for precedents, and his particular interest in issues of Nevada state law. In *McMurray v. United States*, the issue was whether the United States was properly held liable under the Federal Tort Claims Act for a willful failure to guard or warn against a hazardous condition—a hot spring flowing at a temperature of between 160 and 180 degrees

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73. 478 U.S. 186 (1986).

74. *High Tech Gays*, 895 F.2d at 571 (citing *Hardwick*, 478 U.S. at 194–96).

75. *Id.* at 573.

76. *Id.* at 574 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985)).

77. 952 F.2d 1059 (9th Cir. 1991).

78. *Id.* at 1060.

79. *Id.* at 1065.

80. *Id.* at 1066.

Fahrenheit.<sup>81</sup> Judge Brunetti's opinion concluded that the Nevada Supreme Court had "modified the definition of willful conduct" applied in prior federal cases.<sup>82</sup> Thus, over a dissent, the panel upheld the district court's "holding that the government consciously failed to post a sign at Lee Hot Springs despite its knowledge of the danger of persons being burned by this spring."<sup>83</sup> The Court held that "[t]his constitutes a willful failure to warn under [current] Nevada law."<sup>84</sup>

In *Erickson v. Desert Palace, Inc.*, Judge Brunetti wrote an opinion holding that a nineteen-year-old could not pursue a fraud claim arising from a casino's refusal to pay a slot machine jackpot of over one million dollars because the winner was below the legal gambling age of twenty-one.<sup>85</sup> After reviewing Nevada case law, the Court concluded that the attempt to cast the claim as one for fraud did not alter the fact that "the remedy sought here is recovery of an alleged gaming debt."<sup>86</sup> Thus, Nevada law barred the claim because it limits "any action to recover such a debt . . . to the administrative process."<sup>87</sup> In *Morton v. De Oliveira*, Judge Brunetti authored a decision that followed a 1925 Ninth Circuit opinion, *Pacific Steamship Co. v. Sutton*,<sup>88</sup> to hold that a ship owner is strictly liable for the actions of the crew.<sup>89</sup> Once again Judge Brunetti carefully analyzed the development of intervening case law, concluding "Pacific remains the law of this circuit."<sup>90</sup> Finally, in *Ledo Financial Corp. v. Summers*, Judge Brunetti drafted the Court's opinion holding, over a dissent by Judge Noonan, "[N]o unique federal interest exists to justify application of federal common law." which, under prior Supreme Court doctrine, would have precluded a claim against the Federal Deposit Insurance Corporation acting as a receiver for a failed savings and loan based on an alleged oral loan agreement.<sup>91</sup>

In 1999, Judge Brunetti was selected at random to replace Judge Merhige in a criminal case raising unique Fourth Amendment issues, *United States v. Kyllo* ("Kyllo II").<sup>92</sup> The case would eventually wind up

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81. 918 F.2d 834, 835 (9th Cir. 1990).

82. *Id.* at 837.

83. *Id.* at 838.

84. *Id.*

85. 942 F.2d 694, 695 (9th Cir. 1991).

86. *Id.* at 696.

87. *Id.*

88. 7 F.2d 579 (9th Cir. 1925).

89. 984 F.2d 289, 292 (9th Cir. 1993).

90. *Id.* at 292.

91. 122 F.3d 825, 829 (9th Cir. 1997).

92. 190 F.3d 1041, 1043 n.1 (9th Cir. 1999), *rev'd*, 533 U.S. 27 (2001). Judge Robert R. Merhige, Jr. was a Senior United States District Judge for the Eastern District of Virginia and sat by designation on the original appeal. See *United States v. Kyllo*, 140 F.3d 1249, 1250 n.\* (9th Cir. 1998), *withdrawn*, 184 F.3d 1059 (9th Cir. 1999).

in the Supreme Court.<sup>93</sup> In *Kyllo II*, the issue was whether use of a thermal imaging scanner by law enforcement officials on the outside of a home was a “search” within the meaning of the Fourth Amendment.<sup>94</sup> The device could detect unusually high levels of heat emanating from a structure, indicating a likelihood of heat lamps being used to grow marijuana.<sup>95</sup> An officer had reason to believe that the defendant, Kyllo, was growing marijuana indoors.<sup>96</sup> He used the thermal imaging device, which indicated a high degree of heat emanating from Kyllo’s home.<sup>97</sup> The results were used to secure a search warrant for Kyllo’s home.<sup>98</sup> A subsequent search indeed uncovered an indoor marijuana grow operation.<sup>99</sup>

The prior panel, comprised of Judges Noonan, Hawkins, and Merhige, held in a split decision that use of a thermal imaging device was indeed a “search.”<sup>100</sup> Judge Merhige wrote the majority opinion, joined by Judge Noonan, while Judge Hawkins drafted the dissent.<sup>101</sup> Had this opinion stood, the case would have been remanded for a determination of whether probable cause existed to search Kyllo’s home absent consideration of the thermal imaging scan.<sup>102</sup> The panel, however, withdrew the opinion after granting the Government’s motion for rehearing.<sup>103</sup> Judge Merhige then retired and Judge Brunetti was selected as the replacement judge.<sup>104</sup> The new panel arrived at an opposite conclusion, holding that a defendant has no objective expectation of privacy as to hot spots emanating from the walls or roof of a home.<sup>105</sup> This time, Judge Hawkins authored the majority opinion.<sup>106</sup> Judge Brunetti joined Judge Hawkins, while Judge Noonan now found himself drafting a dissent.<sup>107</sup>

Having the last word, the Supreme Court reversed and remanded *Kyllo II* in a five-to-four decision in 2001, holding that such conduct indeed constituted a search.<sup>108</sup> More specifically, the Court held that

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93. *Kyllo v. United States*, 530 U.S. 1305 (2000).

94. 190 F.3d at 1043.

95. *Id.* at 1044.

96. *Id.* at 1043.

97. *Id.* at 1044.

98. *Id.*

99. *Id.*

100. *United States v. Kyllo*, 140 F.3d 1249, 1254–55 (9th Cir. 1998), *withdrawn*, 184 F.3d 1059 (9th Cir. 1999).

101. *Id.* at 1250.

102. *Id.* at 1255.

103. *See United States v. Kyllo*, 184 F.3d 1059, 1059 (9th Cir. 1999).

104. *Kyllo II*, 190 F.3d at 1043 n.1.

105. *Id.* at 1046–47.

106. *Id.* at 1043.

107. *Id.* at 1043, 1047.

108. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

when the government uses a device, not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search" and is presumptively unreasonable without a warrant.<sup>109</sup> Proving this issue did not squarely fall along any particular political lines, Justice Scalia wrote the majority opinion, joined by Justices Souter, Thomas, Ginsburg, and Breyer.<sup>110</sup> Justice Stevens dissented, joined by Justices Rehnquist, O'Connor, and Kennedy.<sup>111</sup>

## 2. *The Execution of Robert Alton Harris*

In 1992 the scheduled execution of Robert Alton Harris resulted in circumstances that, as described by Judge Noonan, would "generate hydraulic pressures."<sup>112</sup> Harris would be the first prisoner in California to be executed in more than twenty-five years.<sup>113</sup> Starting on Friday, April 17, 1992, Harris initiated a flurry of actions seeking a stay of his execution scheduled for one minute after midnight on April 21, 1992.<sup>114</sup> Most notably, a class of prisoners, including Harris, "filed a civil rights action pursuant to [42 U.S.C. §] 1983...[seeking] a permanent injunction banning the use of lethal gas in the execution of a judgment by death."<sup>115</sup> The claim was "that execution by the injection of lethal gas [was] cruel and unusual punishment."<sup>116</sup> "On Saturday evening, April 18, 1992, the district court issued a temporary restraining order enjoining [California] 'from inflicting the punishment of death upon Plaintiffs or any class member by administration of lethal gas.'"<sup>117</sup> The appeal of the temporary restraining order, as well as the denial of a habeas petition filed by Harris, were referred to the panel that had decided the last round of Harris's earlier appeals.<sup>118</sup>

The Ninth Circuit panel called for oral argument on Sunday night. As described by Harris's attorneys:

On Easter Sunday evening, April 19, 1992, five lawyers and a panel of three judges were connected telephonically to argue issues pending in the case of Robert Alton Harris.<sup>119</sup> The pressure was intense. Harris

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109. *Id.*

110. *Id.* at 29.

111. *Id.*

112. See *Gomez v. U.S. Dist. Court*, 966 F.2d 460, 461 (9th Cir. 1992) (Noonan, J., dissenting).

113. *Sevilla & Laurence, supra* note 68, at 348.

114. See *Gomez v. U.S. Dist. Court*, No. 92-70237, 1992 WL 155238, at \*1 (9th Cir. Apr. 20, 1992); *Sevilla & Laurence, supra* note 68, at 370-72.

115. *Gomez*, 1992 WL 155238, at \*1.

116. *Id.* at \*3.

117. *Id.* at \*1.

118. See *id.*; *Sevilla & Laurence, supra* note 68, at 372.

119. Also present were two law clerks, including one of the Authors of this Article.

was scheduled to be executed in little more than twenty-four hours, at 12:01 a.m. on April 21st.<sup>120</sup>

Over Judge Noonan's vigorous dissent, Judges Alarcon and Brunetti vacated the temporary restraining order "under the principles of federalism and comity first announced in *Younger v. Harris*."<sup>121</sup>

"At approximately 10:30 p.m. on the night of the scheduled execution of Harris, ten judges of the Ninth Circuit issued an order staying the execution and calling for en banc vote on whether to rehear the [§ 1983] case."<sup>122</sup> One judge of the Ninth Circuit also issued a stay of execution and called for an en banc vote on the decision to deny his habeas petition.<sup>123</sup> The Ninth Circuit's stay of execution remained in place at the time Harris was scheduled to be executed.<sup>124</sup> At three o'clock in the morning, the United States Supreme Court overturned the stay.<sup>125</sup> The Supreme Court found that the challenge to the use of lethal gas as cruel and unusual punishment amounted to an abuse of the habeas writ, because it "could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process."<sup>126</sup> Justices Stevens and Blackmun dissented, highlighting the pain that was associated with execution by cyanide gas.<sup>127</sup>

Remarkably, though, Harris's appeals were not yet exhausted. Judge Pregerson of the Ninth Circuit would issue another stay—at about four o'clock in the morning when Harris actually was strapped in the chair awaiting execution.<sup>128</sup> In an unusual order, the Supreme Court vacated the stay and ordered that "[n]o further stays of Robert Alton Harris' execution will be entered by the federal courts."<sup>129</sup> Harris was executed at about 6:00 in the morning on April 21, 1992.<sup>130</sup> Even years later, Judge Brunetti would describe to his clerks how "[t]he *Harris* case took a lot out of me; there was so much tension it was unbelievable."<sup>131</sup>

Notably, Judge Brunetti would later join in the Ninth Circuit's opinion holding that the "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual" and that a § 1983 action was a proper vehicle for raising the claim.<sup>132</sup> That he would reach such a

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120. Sevilla & Laurence, *supra* note 68, at 346.

121. *Gomez*, 1992 WL 155238, at \*3. (citing *Younger v. Harris*, 401 U.S. 37, 44 (1981)).

122. Sevilla & Laurence, *supra* note 68, at 376.

123. *Id.* at 376–77.

124. *See id.* at 377.

125. *Id.*

126. *Gomez v. Vasquez*, 503 U.S. 653, 653–54 (1992) (per curiam).

127. *See id.* at 654–58 (Stevens, J., dissenting).

128. Sevilla & Laurence, *supra* note 68, at 378–79 & n.130.

129. *Vasquez v. Harris*, 503 U.S. 1000, 1000 (1992).

130. Sevilla & Laurence, *supra* note 68, at 379.

131. Chiarello & Poate, *supra* note 6, at 18.

132. *Fierro v. Gomez*, 77 F.3d 301, 303, 309 (9th Cir. 1996) (internal quotation marks omitted).

conclusion despite the proceedings in *Harris* is a reflection of his ability to approach each decision on the merits with as much objectivity as possible. Judge Brunetti also was active in using the lessons of the *Harris* proceedings to create a “more streamlined and efficient process by which to handle last-minute death penalty appeals.”<sup>133</sup> Tackling such monumental death penalty issues is just one part of the solemn responsibilities of federal judges.

### C. THE SENIOR STATUS YEARS: 1999–2009

Judge Brunetti assumed senior status on November 11, 1999.<sup>134</sup> He continued to handle a large caseload and to participate in many significant appeals. In *United States v. Cormier*—another Fourth Amendment expectation of privacy case—Judge Brunetti drafted the opinion for a unanimous panel, holding that a defendant has no reasonable expectation of privacy in information contained in a motel’s guest registration records.<sup>135</sup> In that case, a detective went to a high-crime area of Seattle and obtained guest registration records from a motel owner.<sup>136</sup> The detective ran a criminal history check on several of the motel guests, including the defendant Cormier.<sup>137</sup> The records revealed that Cormier had “a fairly extensive criminal history” and that he was a registered sex offender.<sup>138</sup> Based on this information, another officer conducted a “knock and talk” interview with Cormier.<sup>139</sup> Cormier gave consent to the detective to enter and search the motel room.<sup>140</sup> The detective’s search led to the discovery of a loaded handgun in one of Cormier’s jackets hanging in the closet, leading to his conviction for being a felon in possession of a firearm.<sup>141</sup> Judge Brunetti analogized the situation to *United States v. Miller*,<sup>142</sup> where the Supreme Court held that a bank depositor does not have a privacy interest in bank records even though the records may be highly personal.<sup>143</sup> He found that the key factor in *Miller* was “that a person does not possess a reasonable expectation of privacy in an item in which he has no possessory or ownership interest.”<sup>144</sup> Judge Brunetti determined that the bank

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133. Chiarello & Poate, *supra* note 6, at 18.

134. Media Release, United States Court for the Ninth Circuit, *supra* note 32.

135. 220 F.3d 1103, 1108 (9th Cir. 2000). Also sitting on this panel was Judge Brunetti’s close friend, Judge Proctor Hug. *See id.* at 1106.

136. *Id.* at 1106.

137. *Id.* at 1106–07.

138. *Id.* at 1107 (internal quotation marks omitted).

139. *Id.* (internal quotation marks omitted).

140. *Id.*

141. *Id.*

142. 425 U.S. 435 (1976).

143. *Cormier*, 220 F.3d at 1108 (citing *Miller*, 425 U.S. at 443).

144. *Id.*

depositor analysis was “equally applicable to motel registration records.”<sup>145</sup> Under the *Miller* analysis, Judge Brunetti also concluded that unlike bank records, guest registration records were not highly personal information and thus, “the *Miller* rationale [was] even more compelling in the context of guest registration records because no highly personal information [was] disclosed to the police.”<sup>146</sup>

Another memorable criminal appeal that Judge Brunetti participated in was that of the infamous “Unabomber”—Theodore John Kaczynski—in *United States v. Kaczynski*.<sup>147</sup> In one of his several appeals, Kaczynski, who drafted his own briefs, sought to vacate his guilty plea and conviction on the grounds that his plea was involuntary.<sup>148</sup> Kaczynski contended that he was essentially forced to plead guilty in order to avoid the indignity of his counsel presenting evidence of his mental condition at trial—a situation that he would find unbearable and which was purportedly against his wishes.<sup>149</sup> When Kaczynski tried to fire his counsel and assert his Sixth Amendment right to represent himself right before trial, the district court judge denied Kaczynski’s request as untimely and found that the tactic was used to cause delay.<sup>150</sup>

In a two-to-one decision authored by Judge Rymer and joined by Judge Brunetti, the court held that the district court had not erred in concluding that Kaczynski’s request for self-representation was made to cause delay.<sup>151</sup> In what was primarily a factually intensive analysis, the panel resisted addressing the legal issue of whether it is the attorney or the client who controls the decision to present a mental condition defense to the jury, instead noting that Kaczynski’s claim that presenting such a defense would be unbearable was belied by his willingness to present mental condition evidence at a possible penalty phase.<sup>152</sup> Judge Reinhardt, who wrote the dissent, praised the district judge’s effort to ensure the fairness of Kaczynski’s trial but concluded that the denial of Kaczynski’s request for self-representation was contrary to controlling law.<sup>153</sup> Notably, had Judge Reinhardt’s view prevailed, Kaczynski’s conviction would have been overturned and he would have been allowed a new trial where he would have risked being convicted after a jury trial with the possibility of receiving a death sentence. By entering into a plea agreement, however, Kaczynski had avoided the possibility of a death sentence altogether.

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145. *Id.*

146. *Id.*

147. 239 F.3d 1108 (9th Cir. 2001).

148. *Id.* at 1110.

149. *Id.* at 1114, 1117–18.

150. *Id.* at 1112.

151. *Id.* at 1110, 1116.

152. *Id.* at 1118–19.

153. *Id.* at 1119–20, 1127–28.



In the civil arena, Judge Brunetti wrote the majority opinion in *Knox v. Davis*, a 2001 civil procedure case addressing the continuing violation doctrine in the context of the statute of limitations in a § 1983 action.<sup>154</sup> Also sitting on the panel were Judges Wallace Tashima and William Schwarzer,<sup>155</sup> who, notably, were the coauthors of a Ninth Circuit practice guide on civil procedure.<sup>156</sup> The plaintiff, Monica Knox, was a federal public defender who, in 1993, began representing William Packer, an inmate at a California Department of Corrections (“CDC”) facility.<sup>157</sup> The relationship evolved into one of romance. In 1995, Knox and Packer married.<sup>158</sup> After marriage, Knox continued to serve as Packer’s public defense attorney.<sup>159</sup>

In a § 1983 civil rights action, Knox sued the warden of the prison for violating her rights when he revoked her visitation and mail privileges.<sup>160</sup> The prison determined that Knox had abused her visitation and mail privileges by, among other things, misusing her attorney-client relationship with her husband as a cover to make personal visits and/or send personal mail.<sup>161</sup> The long-running dispute over Knox’s conduct that began in late 1994 culminated in a January 20, 1996 letter sent from the CDC to Knox informing her that her legal mail and visitation rights at all CDC facilities and with all CDC inmates was revoked.<sup>162</sup> Over the course of the next ten months, relying on the January 20, 1996, letter, the CDC repeatedly denied Knox legal visitation and mail access.<sup>163</sup> Knox initiated her § 1983 action on July 21, 1997.<sup>164</sup>

The narrow question presented was whether Knox had timely filed her suit within the one year statute of limitations for § 1983 actions in California.<sup>165</sup> If the statute of limitations began to run on January 20, 1996, when she received the letter from the CDC revoking her privileges, then she would have had to file suit by January 20, 1997.<sup>166</sup> Knox filed suit after the January 20, 1997 date, but argued that her action was still timely under a continuing violation theory.<sup>167</sup> In other words, she argued that a new cause of action arose every time she was denied access to one of her

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154. 260 F.3d 1009, 1010 (9th Cir. 2001).

155. *Id.*

156. WILLIAM W. SCHWARZER, A. WALLACE TASHIMA & JAMES M. WAGSTAFFE, CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL (2010).

157. *Knox*, 260 F.3d at 1011.

158. *Id.*

159. *Id.*

160. *Id.* at 1011–12.

161. *Id.*

162. *Id.* at 1012.

163. *Id.*

164. *Id.*

165. *Id.* at 1010–11.

166. *See id.* at 1013.

167. *Id.*

clients housed at a CDC facility.<sup>168</sup> Over Judge Schwarzer's dissent, Judge Brunetti, joined by Judge Tashima, wrote the majority opinion, holding that the January 20, 1996, letter was a final determination by the CDC that started the running of the statute of limitations, and that "the CDC's subsequent and repeated denials of Knox's privileges with her clients [were] merely the *continuing effect* of the original suspension."<sup>169</sup> As was Judge Brunetti's nature, he took a practical approach to this issue, understanding that to hold otherwise would render Congress's intent to impose a statute of limitations meaningless since Knox could reset the statute of limitations any time she wanted simply by seeking access to a CDC facility.<sup>170</sup>

In a free speech case, Judge Brunetti and his longtime friend Judge Hug were on opposite sides of a high-profile appeal involving the Venetian Casino Resort (the "Venetian"). In *Venetian Casino Resort v. Local Joint Executive Board*, the question was "whether a sidewalk constructed on private property to replace a public sidewalk, accommodating pedestrian traffic adjacent to Las Vegas Boulevard, is a public forum subject to the protections of the First Amendment."<sup>171</sup> During construction, the Venetian entered into an agreement with the relevant governmental authorities to widen the roadway on Las Vegas Boulevard.<sup>172</sup> To do this, however, the government needed to create a new lane with space that was previously used as a government-owned public sidewalk.<sup>173</sup> In return for the wider roadway, the Venetian agreed to create a pedestrian passageway on what was indisputably its private property.<sup>174</sup> Soon after a sidewalk on the Venetian property was constructed, a number of unions applied to Clark County for—and were granted—permits to demonstrate on the sidewalk in front of the Venetian.<sup>175</sup> The Venetian issued warnings to protesters that they were on private property and requested that the local police remove the demonstrators as trespassers.<sup>176</sup> Based on advice from the Clark County District Attorney's Office, the police refused to take any action against the demonstrators.<sup>177</sup> The Venetian sued seeking a declaratory judgment that the sidewalk is not a public forum, as well as an injunction requiring

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168. *Id.*

169. *Id.* (emphasis added).

170. *See id.* at 1014.

171. 257 F.3d 937, 939 (9th Cir. 2001).

172. *Id.* at 940.

173. *Id.* at 939–40, 942.

174. *See id.* at 940.

175. *Id.*

176. *Id.*

177. *Id.* at 940–41.

the County to enforce the Venetian's rights to exclude demonstrators from its private property.<sup>178</sup>

In a two-to-one decision, the Ninth Circuit affirmed the district court's refusal to grant declaratory relief to the Venetian.<sup>179</sup> Judge Hug, joined by Judge Schroeder, drafted the majority opinion.<sup>180</sup> Judge Brunetti dissented.<sup>181</sup> The primary disagreement was how to determine whether the sidewalk, albeit on private property, was a public forum for First Amendment purposes. Judge Hug focused on the fact that the original sidewalk which the Venetian sidewalk replaced historically had been a public forum.<sup>182</sup> In building the new sidewalk, the Venetian had not done anything to fundamentally alter the sidewalk's character or its use by the public.<sup>183</sup> In other words,

The newly constructed sidewalk still performs the same role as a thoroughfare for pedestrian traffic along Las Vegas Boulevard that it performed before the construction of the Venetian. . . . [The purpose is] "to facilitate pedestrian traffic in daily commercial life along the Las Vegas Strip generally," and not merely to provide access to the Venetian for its patrons.<sup>184</sup>

Thus, the majority found that the new sidewalk was indeed a public forum and the Venetian could not prevent the unions from lawfully demonstrating on that space.<sup>185</sup>

In his dissent, Judge Brunetti disagreed that the new sidewalk is a public forum merely because it is open to the public generally.<sup>186</sup> In his view, this case was more a matter of contract interpretation than First Amendment law.<sup>187</sup> The new sidewalk was on land that had always been privately held, and thus he thought it improper to label it a public forum simply because it took the place of an adjacent piece of land that had once been a public forum.<sup>188</sup> Instead, he focused on the contract negotiations between the Venetian and the County that led to widening the roadway and moving the sidewalk.<sup>189</sup> As Judge Brunetti put it, "[i]t is clear that the County could have (and should have) demanded a full conveyance of the sidewalk. . . . The County . . . should not be given by

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178. *Id.* at 941.

179. *Id.* at 939.

180. *Id.*

181. *Id.*

182. *Id.* at 948.

183. *Id.* at 944-45.

184. *Id.* (quoting *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd.*, 45 F. Supp. 2d 1027, 1035 (D. Nev. 1999)).

185. *Id.* at 948.

186. *Id.* at 953.

187. *Id.*

188. *Id.* ("[T]he fact that a public sidewalk existed at one time just a few feet away does not convert private property into public property.").

189. *Id.* at 950-51.

this court property rights that it clearly bargained away.”<sup>190</sup> He further concluded that the Venetian was regulating access to an activity on private property, which is a private function.<sup>191</sup> Finally, Judge Brunetti stated that had the contract between the Venetian and the County provided the public an explicit right to the property, he would have sided with the majority in finding that First Amendment rights attached to the new sidewalk.<sup>192</sup>

Some might view the Venetian dissent as consistent with the stereotype of a judge who was appointed by a Republican President. After all, Judges Hug and Schroeder are generally considered “liberal” judges, whereas Judge Brunetti was often labeled a conservative judge.<sup>193</sup> Judges Hug and Schroeder emerge as champions of First Amendment rights whereas Judge Brunetti appears to be denying the union’s right to demonstrate. But a closer look at the decision shows Judge Brunetti’s deference to the other branches of government to create and execute laws. He was loathe to undercut legislative authority absent a clear constitutional violation. In other words, he was not an activist judge and took a very pragmatic approach to each case. In Judge Brunetti’s view, the County essentially *failed to legislate* the bundle of rights associated with the sidewalk on the Venetian’s property.<sup>194</sup> Had the County negotiated for the new sidewalk to remain a public forum, Judge Brunetti would have shown deference to the County in enforcing the terms of the contract.<sup>195</sup> As it stood, however, Judge Brunetti concluded that the Court ought not to be giving the County rights “that it clearly bargained away.”<sup>196</sup>

In 2003, Judge Brunetti again faced appeals regarding sentencing issues in *United States v. Leon*.<sup>197</sup> The case followed a series of decisions starting with *Apprendi v. New Jersey*,<sup>198</sup> in which the Supreme Court established important changes to the federal sentencing landscape and ultimately concluded, in *United States v. Booker*, that the United States Sentencing Guidelines are advisory only and not mandatory.<sup>199</sup> In addition to the constitutional issues raised by *Apprendi* and its progeny, the Ninth Circuit issued numerous decisions during this time frame affecting the application of the Sentencing Guidelines. One such decision was Judge Brunetti’s opinion in *Leon*.

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190. *Id.* at 951.

191. *Id.* at 952.

192. *Id.* at 953.

193. *Id.* at 951.

194. *See id.*

195. *Id.* at 953.

196. *Id.* at 951.

197. 341 F.3d 928 (9th Cir. 2003).

198. 530 U.S. 466 (2000).

199. 543 U.S. 220, 246 (2005).

In *Leon*, the defendant-appellee, Leon, was convicted of numerous counts of preparing false tax returns.<sup>200</sup> As a result, Leon's starting "offense level" under the Sentencing Guidelines was seventeen.<sup>201</sup> Given Leon's criminal history, an offense level of seventeen meant that the range for his sentence would be twenty-seven to thirty-three months.<sup>202</sup> The district court, however, adjusted Leon's offense level from seventeen to eleven based on Leon's family ties and responsibilities.<sup>203</sup> This downward departure lowered the sentencing range to ten to sixteen months.<sup>204</sup> In addition, it placed Leon in a different "zone" under the Sentencing Guidelines such that the district court could (and did) split Leon's sentence between imprisonment and home detention.<sup>205</sup> The Government appealed the departure.<sup>206</sup>

Judge Brunetti began his analysis by noting that family ties and responsibilities ordinarily are irrelevant in determining whether a sentence should be outside the Sentencing Guidelines range, but that such circumstances could justify a downward departure if sufficiently extraordinary.<sup>207</sup> In comparing cases that allowed downward departures based on family circumstances with those that did not, Judge Brunetti noted that the cases turned on whether the defendant was an indispensable caretaker for children, the elderly, or ill family members.<sup>208</sup> Cases allowing a departure did so to protect such family members from the effects of the defendant's incarceration.<sup>209</sup>

In applying this standard, Judge Brunetti noted that Leon was the sole caretaker for his wife, who had recently had a kidney removed due to renal cancer, and had other medical conditions.<sup>210</sup> As a result, Mrs. Leon could not work full time, could not drive, and could not fully care for herself.<sup>211</sup> In addition, Mrs. Leon had been suffering from depression since the time prior to Leon's indictment and was diagnosed as a high suicide risk if she were to lose Leon to prolonged incarceration.<sup>212</sup> The evidence concerning Mrs. Leon's emotional state was not contradicted by the Government.<sup>213</sup> The evidence also indicated that Leon was the only person available to provide material, physical, and emotional support to

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200. 341 F.3d at 929.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 929, 931.

207. *Id.* at 931.

208. *Id.* at 931-32.

209. *Id.*

210. *Id.* at 932.

211. *Id.* at 930, 932.

212. *Id.* at 932.

213. *Id.* at 933.

Mrs. Leon.<sup>214</sup> In light of the uncontested evidence indicating that Leon was an indispensable caretaker for his wife, the court affirmed the district court's downward departure.<sup>215</sup> This decision, which predated *Booker*, in a sense foreshadowed *Booker* by recognizing the traditional role of the district judge to exercise discretion in sentencing, at least where the record is materially uncontested.

The decisions in two Fourth Amendment criminal appeals arising out of motions to suppress reflect Judge Brunetti's careful focus on the underlying facts in deciding cases. In *United States v. Wong*, the defendant-appellant, Wong, was convicted of receipt and possession of child pornography.<sup>216</sup> Police officers found the evidence supporting the charges for these crimes when they conducted searches, with warrants, of Wong's home and computers while investigating the murder of Wong's live-in girlfriend.<sup>217</sup> Given that the warrants were unrelated to the child pornography evidence ultimately found on Wong's computer, the court addressed the plain view doctrine as applied to evidence contained on a computer.<sup>218</sup> In an opinion by Judge Brunetti, the court held that each of the three elements supporting the application of the plain view doctrine was satisfied.<sup>219</sup> First, the officer was lawfully in the place where the evidence was in plain view, because he performed his search pursuant to a valid warrant issued in connection with the murder investigation.<sup>220</sup> That warrant allowed the officer to search graphics files because, as part of the investigation, the officer was looking for maps and other images that would have been stored as graphics files.<sup>221</sup> During the search, the officer viewed graphics files containing the child pornography.<sup>222</sup> Second, the incriminating nature was immediately apparent.<sup>223</sup> Third, the officer had a lawful right of access to the individual graphic files pursuant to the search warrant.<sup>224</sup> The court affirmed the district court's denial of Wong's motion to suppress.<sup>225</sup>

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214. Although Mrs. Leon had other relatives, each was unavailable due to distance or other reasons. *Id.* at 930–31.

215. *Id.* at 933–34.

216. 334 F.3d 831, 833 (9th Cir. 2003).

217. *Id.*

218. *Id.* at 838.

219. The plain view doctrine allows law enforcement officials to collect evidence that it finds in plain view if three elements are satisfied: (1) the officer must lawfully be in the place where the evidence is in plain view, (2) the incriminating nature of the evidence must be immediately apparent, and (3) the officer must have a lawful right of access to the evidence itself. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 839.

Subsequent to *Wong*, the court reached the opposite result on the Fourth Amendment issue in *United States v. Deemer*, which also involved evidence found in plain view.<sup>226</sup> Here, the court considered the applicability of the emergency exception to a warrantless search.<sup>227</sup> The case began with a call to 911.<sup>228</sup> The caller, apparently intoxicated, said “911” to the dispatcher and then hung up.<sup>229</sup> The dispatcher tried to call back, but nobody answered.<sup>230</sup> The dispatcher then sent police officers to the source of the call.<sup>231</sup> The 911 system indicated that the call came from Room 105 at a motel.<sup>232</sup> That particular motel was well known to the local police, who had responded to calls from the motel on numerous prior occasions.<sup>233</sup> Based on those prior calls, the responding officers knew that the 911 system often displayed Room 105 as the source of 911 calls from the motel, even if the calls actually came from a different room.<sup>234</sup>

The responding officers went to Room 105, which was quiet and had no lights on.<sup>235</sup> Nobody answered when they knocked.<sup>236</sup> The officers then went to an adjacent room, which had the lights on and loud music playing.<sup>237</sup> One officer believed that the rooms might be connected because Room 105 was small and had no window, and the rooms shared a common wall.<sup>238</sup> When the officers knocked, a woman answered but opened the door only a few inches.<sup>239</sup> She stood in the doorway and obstructed the view into the room.<sup>240</sup> The woman then exited the room and the officers questioned her.<sup>241</sup> The woman said that nobody else was in the room, but the officers then heard movement in the room.<sup>242</sup> The woman again said that nobody was in the room.<sup>243</sup> The officers entered and performed a cursory search.<sup>244</sup> During the search, they found the

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226. 354 F.3d 1130 (9th Cir. 2004).

227. *Id.* at 1131.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 1131–32.

240. *Id.* at 1132.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

defendant-appellant, Deemer, in the bathroom.<sup>245</sup> They also found a methamphetamine laboratory.<sup>246</sup>

Deemer moved to suppress the evidence seized on the ground that the officers' entry into the motel room violated the Fourth Amendment.<sup>247</sup> The district court denied the motion.<sup>248</sup> In his opinion Judge Brunetti set forth the three elements of the emergency exception to the Fourth Amendment's warrant requirement.<sup>249</sup> He then concluded that the third element, that the police have a reasonable basis "approximating probable cause," was not satisfied.<sup>250</sup> The police had little reason to believe that the possible emergency that triggered the 911 call was specifically in Deemer's room.<sup>251</sup> The motel was large; the officers knew that the 911 system was often incorrect in identifying Room 105, and the fact that Deemer's room was adjacent to Room 105 was insufficient.<sup>252</sup> If the rule were otherwise, Judge Brunetti reasoned, then the police would be able to search multiple houses in a given area based on a 911 call from only one of the houses.<sup>253</sup> The court held that the district court had erred in denying Deemer's motion to suppress.<sup>254</sup> The decision to uphold the defendant's Fourth Amendment rights, despite the presence of contraband in plain view, reflects Judge Brunetti's disciplined application of precedent.

Judge Brunetti's opinions, of course, covered a wide range of cases in the civil arena, including several concerning intellectual property issues. One such opinion is *Earthquake Sound Corp. v. Bumper Industries*.<sup>255</sup> *Earthquake* involved two companies, Earthquake and Bumper, which competed in selling car audio equipment.<sup>256</sup> Earthquake had a number of "quake" trademarks related to its car audio products, including "Bass-Quake" and "Earthquake."<sup>257</sup> Bumper began using the word "Carquake" with its products.<sup>258</sup> Earthquake claimed that

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245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. These are: (1) the police must have "reasonable grounds to believe that there was an emergency" requiring their immediate assistance, (2) the search must not be "primarily motivated by an intent to arrest and seize evidence," and (3) the police must have "a reasonable basis, approximating probable cause, to associate the emergency with the area to be searched." *Id.* (citing *United States v. Cervantes*, 219 F.3d 882, 888–91 (9th Cir. 2000)).

250. *Id.* at 1132–33.

251. *Id.* at 1133.

252. *Id.*

253. *See id.*

254. *Id.*

255. 352 F.3d 1210 (9th Cir. 2003).

256. *Id.* at 1211–12.

257. *Id.* at 1212.

258. *Id.*



“Carquake” infringed Earthquake’s trademarks.<sup>259</sup> Earthquake moved for summary judgment on the issues of liability for infringement and entitlement to attorney’s fees, and the district court granted the motion.<sup>260</sup> On appeal, the Ninth Circuit affirmed as to liability for infringement and remanded for the district court to conduct further proceedings concerning damages and attorney’s fees.<sup>261</sup> The district court, having earlier determined that Bumper’s infringement was willful, deliberate, and knowing, awarded fees to Earthquake, and Bumper again appealed.<sup>262</sup>

On the second appeal, the Ninth Circuit considered, among other issues, the sufficiency of the showing that the case was “exceptional,” such that an award of attorney’s fees would be permissible under 15 U.S.C. § 1117(a).<sup>263</sup> Writing for the court, Judge Brunetti noted that a trademark case is considered “exceptional” where “the defendant has acted maliciously, fraudulently, deliberately, or willfully.”<sup>264</sup> Judge Brunetti agreed with the district court that Bumper’s conduct met this standard.<sup>265</sup> The “Earthquake” and “Carquake” trademarks were similar; the parties used the same marketing channels; Bumper used product identification codes similar to those used by Earthquake; the warranty information for certain Bumper products concealed Bumper’s identity; there was evidence of actual consumer confusion; Earthquake promptly informed Bumper of confusion arising from Bumper’s use of “Carquake,” but Bumper did not take steps such as consulting counsel to investigate the possibility of infringement; and Bumper said it would stop using the “Carquake” mark but continued to use it.<sup>266</sup> The Ninth Circuit affirmed.<sup>267</sup> This case reflects Judge Brunetti’s customary focus on sensible analysis of the totality of the pertinent evidence and provides a helpful illustration for the lower courts to use in determining whether “exceptional” circumstances exist to award fees.

In 2008, Judge Brunetti was again in the vortex of a highly charged criminal law case. In *Osborne v. District Attorney’s Office*, “William Osborne, an Alaska prisoner, brought [an] action under 42 U.S.C. § 1983 to compel the District Attorney’s Office in Anchorage to allow him post-conviction access to biological evidence . . . used to convict him in 1994 of kidnapping and sexual assault.”<sup>268</sup> Judge Brunetti authored a unanimous opinion holding,

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259. *Id.*

260. *Id.*

261. *See id.*

262. *Id.*

263. *Id.* at 1216.

264. *Id.*

265. *Id.* at 1217–19.

266. *Id.* at 1217–18.

267. *Id.* at 1220.

268. 521 F.3d 1118, 1121 (9th Cir. 2008), *rev’d*, 129 S. Ct. 2308 (2009).

[U]nder the unique and specific facts of this case and assuming the availability of the evidence in question, Osborne has a limited due process right of access to the evidence for purposes of post-conviction DNA testing, which might either confirm his guilt or provide strong evidence upon which he may seek post-conviction relief.<sup>269</sup>

Judge Brunetti concluded that the State's "paramount interests are in seeking justice, not obtaining convictions at all costs, and [if exculpatory evidence is revealed, the State] will then have strong evidence for use in catching and punishing the real perpetrator."<sup>270</sup> Providing access to the evidence could either confirm the validity of the conviction or lead to Osborne's exoneration.<sup>271</sup> "Importantly, the State is prejudiced in neither case, and the truth-seeking function of the criminal justice system is furthered in either case."<sup>272</sup> Reflecting his general approach, Judge Brunetti was careful to note, "We are presented with a certain set of circumstances presenting a meritorious case for disclosure, and our analysis and holding are addressed to those circumstances only."<sup>273</sup>

The Supreme Court reversed in a five-to-four decision.<sup>274</sup> The Court held that there is no "right under the Due Process Clause to obtain postconviction access to the State's evidence for DNA testing," reasoning that providing such a right of access is a "task [that] belongs primarily to the legislature."<sup>275</sup> Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter dissented.<sup>276</sup> Justice Stevens would have affirmed the Ninth Circuit's decision because he was "convinced that Osborne [had] a constitutional right of access to the evidence he wishe[d] to test and that, on the facts of this case, he . . . made a sufficient showing of entitlement to that evidence."<sup>277</sup> Justice Stevens shared Judge Brunetti's view that there are "powerful state interests that offset the State's purported interest in finality *per se*. When a person is convicted for a crime he did not commit, the true culprit escapes punishment. DNA testing may lead to his identification."<sup>278</sup>

## CONCLUSION

The range and difficulty of the decisions facing federal circuit judges are amply illustrated by a review of just a fraction of the Ninth Circuit

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269. *Id.* at 1122.

270. *Id.* at 1141.

271. *Id.*

272. *Id.*

273. *Id.* at 1142.

274. *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009).

275. *Id.* at 2316.

276. *Id.* at 2331.

277. *Id.*

278. *Id.* at 2337.

cases in which Judge Brunetti participated. While his decisions often reflect a conservative approach, on balance Judge Brunetti's record demonstrates why he built a non-ideological reputation on the court.<sup>279</sup> Judge Brunetti stands out for his efforts to approach each case on its own merits and to resist deciding cases simply along partisan lines. Thus, for example, he voted to strike down English-only laws in *Yniguez v. Arizonians for Official English*,<sup>280</sup> joined in Judge Kozinski's opinion striking down the United States Sentencing Guidelines as a violation of the separation of powers doctrine,<sup>281</sup> and would recognize a due process right to post-conviction DNA evidence, as outlined in his opinion in *Osborne*.<sup>282</sup> Judge Brunetti ultimately would decide that the use of lethal gas was cruel and unusual punishment<sup>283</sup> despite the earlier decision in *Harris* overturning the district court's temporary restraining order prohibiting execution by the administration of lethal gas.<sup>284</sup>

At the same time, his decisions in *High Tech Gays v. Defense Industrial Security Clearance Office*<sup>285</sup> and *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board*<sup>286</sup> reflect his preference for judicial restraint. Judge Brunetti's opinions in *Adamson v. Ricketts*,<sup>287</sup> the *Harris* appeals,<sup>288</sup> and *Kyllo II*,<sup>289</sup> evidence his respect for prosecutorial discretion and the need for finality in criminal proceedings.

More than anything, though, Judge Brunetti's opinions show that he truly did strive to "decide[] cases 'on the facts and the record' and . . . draft no-nonsense opinions that parties and future litigants can understand."<sup>290</sup> Needless to say, no judge serving on the court of appeals for twenty-four years can escape making decisions that spark controversy and disagreement. But especially as the judicial appointment process seems to grow increasingly partisan, Judge Brunetti's career stands as an example that our faith in the role of a strong and independent federal judiciary in our democracy is not misplaced.

As Judge Kozinski wrote in *Gubiensio-Ortiz v. Kanahale*, "Judicial prestige is not an unlimited resource; it is a fragile and finite one, easily damaged or exhausted. '[P]ublic confidence in the judiciary is

279. This reputation has been acknowledged, for example, by Judge Stephen Reinhardt, a noted liberal Judge of the Ninth Circuit. See Levine, *supra* note 11.

280. 69 F.3d 920, 924 (9th Cir. 1995).

281. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1268 (9th Cir. 1988).

282. 521 F.2d 1118, 1122 (9th Cir. 2008).

283. See *Fierro v. Gomez*, 77 F.3d 301, 302 (9th Cir. 1996).

284. *Gomez v. U.S. Dist. Court*, No. 92-70237, 1992 WL 155238, at \*3 (9th Cir. Apr. 20, 1992); see *supra* notes 112-133 and accompanying text.

285. 895 F.2d 563, 565 (9th Cir. 1990).

286. 257 F.3d 937, 939 (9th Cir. 2001).

287. 483 U.S. 1, 12 (1987).

288. See, e.g., *Harris v. Vasquez*, 949 F.2d 1497, 1501 (9th Cir. 1990).

289. 190 F.3d 1041, 1043 (9th Cir. 1999).

290. *Chiarello & Poate*, *supra* note 6, at 18.

indispensable to the operation of the rule of law . . . .”<sup>291</sup> Judge Brunetti’s life and work inspired those who knew him. His judicial legacy should bolster public confidence in the federal judiciary and help justify our belief in the rule of law.

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<sup>291</sup> 857 F.2d 1245, 1262 (9th Cir. 1988) (quoting *Hobson v. Hansen*, 265 F. Supp. 902, 923 (D.D.C. 1967) (Wright, J., dissenting)).

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